

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL EDWARD DANIEL,

Defendant-Appellant.

UNPUBLISHED

August 5, 2014

No. 308230

Lenawee Circuit Court

LC No. 10-014969-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD DEE MCGLOWN,

Defendant-Appellant.

No. 308231

Lenawee Circuit Court

LC No. 10-014755-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PETER LAMONT DANIEL,

Defendant-Appellant.

No. 308575

Lenawee Circuit Court

LC No. 10-014968-FC

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

In these consolidated appeals, Paul Edward Daniel, his twin brother Peter Lamont Daniel, and Leonard Dee McGlown stood trial jointly in 2011 on charges arising from the shooting death of Marcus Newsom in February 2002. One jury determined the guilt of the Daniel defendants

and a separate jury weighed defendant McGlown's guilt. The Daniel jury convicted the Daniel defendants of first-degree premeditated murder, MCL 750.316(1)(a), conspiracy to commit first-degree murder, MCL 750.157a and MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. The second jury convicted defendant McGlown of these same three offenses. The trial court sentenced all three defendants to concurrent terms of life imprisonment for the conspiracy and murder convictions, and a consecutive two-year term for the felony-firearm conviction. Each defendant appeals as of right. We affirm in all three appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the shooting of Marcus Newsom on February 9, 2002. According to the prosecution, defendants, along with codefendant Cordall Neal, shot the victim in his car at about 9:30 p.m. According to witness testimony, the victim was driving in a red car when a light-colored van either slowed or stopped next to the victim's car at the intersection of Park Street and College Avenue in Adrian, Michigan. Gun shots were heard, and the van left the scene immediately. The victim was found badly injured in his vehicle, which belonged to his sister, and died shortly thereafter in the hospital from multiple gunshot wounds. A few minutes after the shooting, defendants were stopped by police because they were driving in a light-colored van which matched witnesses' descriptions of the van involved in the shooting. Neal was in the driver's seat, defendant McGlown was in the passenger seat, and the Daniel defendants were in the back seat. Later, while retracing the route between the shooting and the location where defendants were stopped, police recovered two revolvers, a pistol, and three gloves that had been discarded in the roadway. Bullets from one of the revolvers were found in the victim's vehicle, and bullets from the pistol were found in the victim's body.

Defendants were subsequently charged and tried for murder. The victim's aunt testified that Neal called her after the shooting. Allegedly, Neal had been trying to shoot the victim's sister's boyfriend, Jamal Bradley, because Bradley allegedly robbed Neal's grandmother and shot Neal's uncle. Both the victim and Bradley frequently drove the victim's sister's vehicle, a red car. Neal told the victim's aunt that he had paid his twin uncles to kill Bradley. According to Neal, defendants had shot the victim by mistake because they thought it was Bradley. Neal told the victim's aunt that he was driving and fired no shots.

After a nineteen-day trial, defendants were convicted of first-degree premeditated murder, conspiracy to commit first-degree murder, and felony-firearm. At trial, all three defendants were ordered to wear electronic restraints. In 2012, defendants appealed their convictions, and filed motions to remand for an evidentiary hearing on the use of restraints at trial. This Court granted defendant's motions,¹ and the trial court held an evidentiary hearing on the issue. Following the hearing, the trial court found no error in its decision to order defendants

¹ *People v Paul Daniel*, unpublished order of the Court of Appeals, entered November 1, 2012 (Docket No. 308230); *People v McGlown*, unpublished order of the Court of Appeals, entered November 21, 2012 (Docket No. 308231); *People v Peter Daniel*, unpublished order of the Court of Appeals, entered November 21, 2012 (Docket No. 308575).

to wear electronic restraints and refused to grant a new trial. Defendants now appeal their convictions.

II. ELECTRONIC RESTRAINTS

All three defendants maintain that the trial court's placement of an electronic restraint on their legs deprived them of their rights to counsel, due process, and a fair trial. Defendants contend that there was no justification for the restraints and that the restraints adversely affected their concentration at trial and their conferences with defense counsel. They additionally assert that the trial court erred in refusing to allow defendants to call jurors to testify at the evidentiary hearing regarding whether the jury saw their restraints during trial.

Shortly before the trial court undertook jury selection, the Daniel defendants objected to proceeding while wearing electronic restraints. Peter Daniel protested concerning the "barbaric" nature of the officers' placement of the device on his leg, which he maintained was unjustified, and Paul Daniel concurred in his brother's objection, but neither defendant argued that the restraints infringed on any constitutional right. Defendant McGlown raised no objection to the electronic restraint. Consequently, the constitutional challenges that defendants raise on appeal are unpreserved. Furthermore, the record indicates that Peter Daniel acted to intentionally display his restraint in the courtroom and affirmatively expressed his agreement to waive any claims of prejudice relating to the exposure of the restraint. Accordingly, Peter Daniel waived, and thus extinguished, this claim of error. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000).²

We review "for an abuse of discretion under the totality of the circumstances" a trial court's decision to order a defendant to wear a restraint during trial. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). We review for clear error a trial court's factual findings. MCR 2.613(C) (a reviewing court must also defer to the "special opportunity of the trial court to judge the credibility of the witnesses"). "[E]ven if a trial court abuses its discretion [in] requir[ing] a defendant to wear restraints, the defendant must show that he suffered prejudice as a result of the restraints to be entitled to relief." *Payne*, 285 Mich App at 186. We review unpreserved constitutional claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v Missouri*, 544 US 622, 629; 125 S Ct 2007; 161 L Ed 2d 953 (2005). A trial court may restrain a criminal defendant if it makes "a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994).

² Our reading of the record belies the prosecutor's suggestion that defense counsel for Paul Daniel waived any objections to the placement of Paul's electronic device.

On the first day of jury selection, the trial court advised defendants that it had ordered the placement of electronic devices “for security purposes, only” because of an imminent threat of danger to courtroom safety and security. The court further noted that the devices were “not evident or apparent to anyone other than those present in this discussion” and “would not be arbitrarily activated.”

Many witnesses testified at the evidentiary hearing on remand, including defendants, defendant McGlown’s trial counsel, and multiple courtroom security officers. Following the hearing, the trial court further explained its reasons for ordering the defendants to wear the electronic restraints and its finding that the devices did not prejudice the defendants, stating:

Three defendants before one court with significant charges did arouse a special need in this community. . . . [I]n this particular case, the circumstances surrounding the allegations and the charges and the number of defendants that would be appearing before the Court to face those charges caused special-need consideration by this Court. . . . [I]t was only after this Court was convinced that the safety of all pertinent persons, including the defendants, counsel, court staff, security, guests and visitors, witnesses, dictated special consideration be given to the circumstances surrounding . . . the trial. There was nothing standard practice about this matter.

This Court sought expertise from Lieutenant [James] Craig, as the record reflects during this evidentiary hearing, with regard to physical security. A great deal of consideration was given to the number of visitors that might accompany three defendants and a deceased victim’s family, that the visitors would be in close proximity to one another, that one defendant in particular [McGlown] was demonstrating significant difficulty adjusting to the jail setting. There was suggestion at pretrial activity that Defendant Leonard McGlown’s theory of the case [pointing guilt at the Daniel defendants] might be such that would create a problem, although that was not confirmed until we were actually in the courtroom on the record.

* * *

At the time of the trial, after the device was ordered, after a period of delay during which Peter Lamont Daniel opposed the device and during that period of opposition, the device was sounded giving greater confidence to the Court that the propriety of the Band-It device and its ability to be effective without full force, that the device contained a mechanism of warning, that it could be placed without flamboyance or evident to the jurors. . . .

I don’t believe . . . that the device was apparent to anyone other than those present in the discussions about its use and those required to know of its continued presence. All of the defendants were made aware the device would be introduced and the consequences in the event of disruption. . . .

* * *

. . . I do know that [it was] apparent throughout the trial and clear during this evidentiary hearing that the attorneys were seen in the courtroom, that the defendants were seen in the courtroom in clear communication with one another; that there was no impediment; and that there would have been ample opportunity, had their [sic] been an impediment, for that to have been raised . . .

* * *

This was an antagonistic environment, so much so that the Court felt compelled to preclude the defendants from engaging with guests in the courtroom because the interactions were such that they were not common courtesies. Even before the trial had started, there was evidence of antagonistic behavior expressed between the defendants and guests in the courtroom.

This Court did not have to involve herself in as much of the history for Mr. McGlown, Peter Daniel or Paul Daniel, except to know that the lieutenant assigned to security did include knowledge of their history, knowledge of the fact that all three of them had been in prison; that Defendant McGlown had demonstrated threatening behavior; that that same type of behavior could threaten other defendants, guests in the courtroom, court personnel and security; that there was pre-trial activity addressing Mr. McGlown's conversations with other inmates . . . that threatened exposure or implied criminal compliance by Peter Daniel and Paul Daniel, a factor that could not be taken lightly by the Court in terms of protecting Peter Daniel, Paul Daniel and Leonard McGlown. There was an air of hostility and intimidation supported by the Court's impression of the potential for heightened security identified during the pre-trial stages.

The defendants were not denied state and federal constitutional right[s] to due process or to counsel. . .

The Band-It device was specifically chosen so as to avoid any knowledge by jurors, discomfort to defendants, any . . . presupposition of punishment . . . or anything other than necessary measures. There is nothing to suggest that the device was seen by jurors, . . . or that we ought to question whether or not the jury was distracted or influenced by a device. That same device is what allowed the three defendants to view evidence presented outside of this room, in the parking lot of the courthouse, and to stand in the presence of the jury free of any indic[i]a . . . or influence of restraint. Every measure the Court could take to prevent any influence or to taint their presence in the courtroom was avoided. The presumption of innocence remained in tact [sic]. The . . . Band-It device did not interfere with their ability to relate, communicate or to participate in their own defense. The dignity of the proceeding remained in tact [sic] . .

If the electronic device was seen, its appearance or familiarity or likeness to a . . . athletic wrap would have undermined any prejudice.

* * *

The Court finds the use of the restraints was justified and necessary; that the Band-It device was not visible to the jury; and if it was, the defendants were not prejudiced by the same.

Our review of the record leads us to conclude that the trial court acted within its discretion in ordering defendants to wear the electronic restraints to preserve courtroom safety and security. The record contains ample factual substantiation for the court's finding that interests particular to defendants' joint trial warranted the restraints. As reflected by defendant McGlown's trial counsel's testimony, defendant McGlown sought to blame the Daniel defendants for the shooting, which visibly irritated the Daniel defendants during trial. Lieutenant Craig detailed at the evidentiary hearing the many specific reasons that had prompted him to urge the trial court to place the electronic restraints under defendants' clothing, including defendants' criminal histories and multiple threats of assaultive behavior by defendant McGlown and defendant Peter Daniel while incarcerated. Several witnesses recounted that around the time jury selection began, defendant Peter Daniel head butted a detective in his effort to resist the placement of the device on his leg. The record also supports the trial court's finding that the proximity of the three defendants and their counsel, two juries, and the potential for many visitors to the courtroom also demanded heightened security under the circumstances of this trial.

Even assuming that the trial court erred in ordering defendants to wear the electronic restraints, defendants still had to "show that [t]he[y] suffered prejudice as a result of the restraints to be entitled to relief." *Payne*, 285 Mich App at 186. A defendant suffers no prejudice if the jury could not see his restraints. *Id.* Ample evidence supports the trial court's finding that neither jury observed the electronic restraints on defendants Paul Daniel and McGlown, given that the restraints were small in size and placed underneath defendants' pants between their knees and ankles. Moreover, the trial court took efforts to ensure the restraints were not seen by the jury. Furthermore, the restraints resembled an athletic band, and did not have the notorious appearance of a standard shackle. For these reasons, defendants were not prejudiced as a result of the restraints, and we do not agree that it is necessary for the jurors to testify regarding whether they saw the restraints.

We also reject defendants' contention that the electronic restraints adversely affected their concentration at trial and their conferences with defense counsel because the devices caused defendants to be intimidated. The record reveals that defendants were able to have discussions with their attorneys, and that the Daniel defendants were able to communicate with each other as well. Moreover, as referenced by the trial judge, the restraints had a warning signal that sounded before the devices were activated. The warning signal sounded when Peter Daniel head butted the detective who put the restraint on him, clearly illustrating to defendants how the warning function on the restraints worked. Therefore, we hold that the electronic restraints did not cause intimidation to defendants that affected their ability to participate at trial and, thus, did not violate their right to due process.

III. ISSUES COMMON TO BOTH DANIEL DEFENDANTS

A. EXTRINSIC INFLUENCE IN THE JURY

The Daniel defendants seek a new trial on the basis that all members of their jury heard extraneous and prejudicial information during the trial. The information involved a female courtroom observer's statement to a juror that her boyfriend had threatened to kill the woman observer's entire family if she neglected to arrange for his acquittal. The Daniel defendants argue that the inappropriate communication about a defendant's violent character injected a real and substantial likelihood that the jury convicted them because of the improper extraneous influence.

The Daniel defendants moved for a mistrial on this ground. "We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial." *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). "This Court will find an abuse of discretion if the trial court chose an outcome that is outside the range of principled outcomes." *Id.* We review for clear error the trial court's findings of fact. MCR 2.613(C). "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Schaw*, 288 Mich at 236 (internal citation and quotation marks omitted).

In *People v Budzyn*, 456 Mich 77, 88-89; 566 NW2d 229 (1997), our Supreme Court stated:

A defendant tried by jury has a right to a fair and impartial jury. During their deliberations, jurors may only consider the evidence that is presented to them in open court. Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment.

In order to establish that the extrinsic influence was error requiring reversal, the defendant must initially prove two points. First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. [Internal citations omitted.]

Near the end of trial, the trial court advised the parties and counsel that it had received a note from a juror on the Daniel defendants' jury concerning "a juror who was engaged [in] or privy to comments made by a courtroom visitor that bears further investigation." The juror was questioned by the court and related that the out-of-court exchange occurred the previous morning in an elevator en route to the courtroom. Another woman on the elevator declared that she had awoken "to the worst morning of [her] life." When the juror responded, "Oh really," the woman answered, "Yeah, my boyfriend called me this morning and said if I didn't get him off this case,

that he would kill my whole family.”³ The juror replied, “Well, you should tell someone.” She later saw the woman from the elevator in the courtroom. The juror added that she inquired of the other jurors what she should do, and they suggested writing a note to the court. The juror explained that she did not advise the court of the exchange the previous day because she believed that the woman from the elevator might follow her advice to disclose the threat.

Upon questioning by the court, the juror denied that the elevator exchange created any problem with hearing evidence, applying the law, deliberating with her fellow jurors, or rendering a verdict free of any prejudice or bias. The juror also denied feeling any fear or intimidation due to the exchange, explaining that she had assumed the woman from the elevator did not know who she was or that she was on a jury. At the request of the Daniel defendants, the trial court questioned the remaining jurors about their exposure to the statement. The jurors remembered hearing details about a boyfriend having threatened a woman’s family and urging the juror to inform the court regarding the conversation. All jurors concurred that they could without hesitation remain impartial in considering the evidence properly presented in the case, adhere to the court’s instructions, participate in unbiased deliberations, and reach impartial verdicts regarding the Daniel defendants.

After reviewing the relevant record and the trial court’s ruling, we cannot characterize as clearly erroneous the court’s factual findings concerning the absence of any prejudice to the Daniel defendants. MCR 2.613(C). The trial court also expressly found credible the jurors’ testimony, a determination to which this Court generally defers. *Id.* We conclude that because the trial court properly found no conceivable prejudice to the Daniel defendants arising from the jury’s exposure to extraneous information, the court acted within its discretion in denying the motions for a mistrial. *Budzyn*, 456 Mich at 88-89. Consequently, the Daniel defendants have not established a basis for a new trial.

B. SUFFICIENCY OF THE EVIDENCE

The Daniel defendants further contend that insufficient evidence proved their guilt as either an aider and abettor or a direct principal in the conspiracy or first-degree murder of the victim. The Daniel defendants maintain that the evidence established only that someone inside a light-colored, full-size work van shot the victim, that they had occupied a van of similar description on the evening of the shooting, and that the police found some weapons along a route the defendants’ van may have driven. The Daniel defendants complain that no evidence demonstrated that they occupied the van when the victim was shot, fired at the victim, aided and abetted someone else, or conspired to kill the victim.

We review de novo a criminal defendant’s challenge to the sufficiency of the evidence supporting his conviction. *People v Harverson*, 291 Mich App 171, 175-177; 804 NW2d 757 (2010). In reviewing a criminal defendant’s challenge to the sufficiency of the evidence, we consider all the evidence presented in the light most favorable to the prosecution to determine

³ The juror denied that the woman’s comment referenced a specific case in which the woman’s boyfriend was involved.

whether a reasonable juror could find the defendant's guilt proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. [*Id.* at 400 (internal quotation and citation omitted).]

"It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The prosecutor urged the jury to convict the Daniel defendants as either aiders and abettors or direct principals. MCL 767.39. To support the Daniel defendants' convictions pursuant to an aiding and abetting theory, the prosecutor had to show that (1) they or some other person committed the crime charged, (2) they performed acts or offered encouragement that assisted the crime's commission, and (3) either (a) at the time that they gave aid and encouragement, they possessed (i) the requisite intent necessary to support their conviction of the charged crime as a principal, or (ii) knowledge that the principal intended the commission of the charged crime, or (b) "the criminal act committed by the principal is an incidental consequence which might reasonably be expected to result from the intended wrong." *People v Robinson*, 475 Mich 1, 6, 9; 715 NW2d 44 (2006) (internal quotations and citation omitted); see also *People v Mass*, 464 Mich 615, 628; 628 NW2d 540 (2001). "An aider and abettor's state of mind may be inferred from all the facts and circumstances." *Carines*, 460 Mich at 757.

"To place the issue of aiding and abetting before a trier of fact, the evidence need only tend to establish that more than one person committed the crime, and that the role of a defendant charged as an aider and abettor amounts to something less than the direct commission of the offense." *People v Vaughn*, 186 Mich App 376, 382; 465 NW2d 365 (1990). "The phrase 'aids or abets'" encompasses "any type of assistance given to the perpetrator of a crime by words or deeds that are intended to encourage, support, or incite the commission of that crime." *People v Moore*, 470 Mich 56, 63; 679 NW2d 41 (2004). "In determining whether a defendant assisted in the commission of the crime, the amount of advice, aid, or encouragement is not material if it had the effect of inducing the commission of the crime." *Id.* at 71. "[W]hether the defendant performed acts or gave encouragement that assisted" "must be determined on a case-by-case basis." *Id.* (internal quotation and citations omitted).

The jury convicted defendants of conspiring to commit first-degree murder and first-degree premeditated murder. Pursuant to MCL 750.157a, "Any person who conspires together with 1 or more persons to commit an offense prohibited by law . . . is guilty of the crime of conspiracy." "A conspiracy is an agreement, expressed or implied, between two or more persons to commit an unlawful or criminal act." *People v Barajas*, 198 Mich App 551, 553-554; 499 NW2d 396 (1993). Establishing a conspiracy requires evidence of specific intent to combine with others to accomplish an illegal objective. *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001). "There must be proof demonstrating that the parties specifically

intended to further, promote, advance, or pursue the unlawful objective.” *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). It is not necessary that each defendant have knowledge of all the ramifications of a criminal conspiracy. *People v Hunter*, 466 Mich 1, 7; 643 NW2d 218 (2002). A person may be involved in a continuing conspiracy by knowingly cooperating to further the criminal object of the conspiracy. *Id.* “[D]irect proof of the conspiracy is not essential; instead, proof may be derived from the circumstances, acts, and conduct of the parties.” *Justice*, 454 Mich at 347.

To convict a defendant of first-degree premeditated murder, the prosecution must prove that the defendant intentionally killed the victim, and that the act of killing was premeditated and deliberate. *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011). “Premeditation and deliberation require sufficient time to permit the defendant to take a second look.” *Id.* (internal citation and quotation marks omitted). Premeditation and deliberation may be established by evidence of (1) the prior relationship between the defendant and the victim, (2) the defendant’s actions before the murder, (3) the circumstances of the killing itself, including the type of weapon used and the location of the wounds inflicted, and (4) the defendant’s conduct after the murder. *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999); *People v Berry (On Remand)*, 198 Mich App 123, 128; 497 NW2d 202 (1993). Circumstantial evidence and the reasonable inferences arising therefrom may suffice to prove the elements of a crime, and “[m]inimal circumstantial evidence is sufficient to prove an actor’s state of mind.” *People v Ortiz*, 249 Mich App 297, 301; 642 NW2d 417 (2001); *Abraham*, 234 Mich App at 656.

We conclude that sufficient evidence was presented to establish beyond a reasonable doubt that the Daniel defendants conspired to kill Jamal Bradley; premeditated and deliberated Bradley’s killing, and accidentally shot the victim intending to kill Bradley. Residents of Park Street testified that around 9:30 p.m. on February 9, 2002, they heard multiple, rapid-fire gunshots emanating from the nearby intersection of Park Street and College Avenue. Witnesses observed in the intersection a light-colored (white or gray or silver), windowless contractor’s van with its lights off stopped next to a red car, and saw the van accelerate away from the scene. Two witnesses described hearing gunshots that sounded different: one witness recalled hearing “loud bangs and then a rapid succession of smaller ones,” and another witness recounted hearing rapid fire followed by “a big boom, . . . one big shot.” Two witnesses recounted that the van stopped in the street next to the victim’s red car with the van’s passenger side facing the driver’s side of the car, and the van and the car were stopped within 3 to 10 feet of each other.

Adrian Township Police Officer Mark Houser testified that while on patrol at approximately 9:30 p.m. on February 9, 2002, he heard a dispatch regarding a white, full-size Ford van that reportedly was involved in a shooting in Adrian. A short time later he observed a white, full-size Ford van heading away from Adrian, and he effectuated a traffic stop of the vehicle. The van contained Cordall Neal, who was driving, defendant McGlown, who was in the front passenger seat, and the Daniel defendants, who rode in the back of the van. After retracing the route of the pursuit, Houser recovered in the roadway a Smith & Wesson .45-caliber revolver, a Rossi .38-caliber/.357-caliber revolver, and a MAC-10 9-millimeter semiautomatic pistol.

Stuart Burritt, an expert in firearms and tool mark identification, examined the firearms and other evidence. He determined that identifiable bullet remnants recovered from the victim’s

body and several other bullets recovered from the victim's car matched the 9-millimeter pistol; a bullet core removed from near the passenger door of the victim's car "originated from a .40 or .45-plus caliber firearm;" 12 casings recovered from the intersection of Park Street and College Avenue also matched the 9-millimeter pistol; and a bullet fragment recovered from just inside the van's back doors matched the .38-caliber revolver. The testimony of Burritt and Reinhard Pope, an expert in shooting scene reconstructions, established that the rear passenger-side doors of the van, which both opened outward, had sustained a bullet hole in the door closest to the front passenger-side door of the van. Burritt and Pope opined that the hole in the van's rear passenger-side door had been made by a bullet traveling from the outside to the inside of the van. Pope ascertained that "if you swing the door around almost all the way forward, that angle . . . would line up with someone sitting in the right front passenger seat of the van and then shooting back" toward the driver's seat of the victim's car.

Burritt testified that he observed areas of bullet damage in the victim's car "to the driver's side door, window area, the roof of the vehicle, and the windshield." Burritt performed measurements of the damaged areas that included the placement of dowels into some of the areas to "suggest possible angle and direction that the bullets might have traveled." In Burritt's estimation, two bullet markings near the middle of the driver's-side car door appeared to have come from a gun at an angle "perpendicular to the vehicle," at least two areas of damage to a "B-pillar of the automobile," located "where the [driver's-side] door closes," apparently struck the car from a gun fired at "a forward-to-back angle," and a hole in the car's windshield was made by a bullet that traveled in "a front-to-back direction."

Pope testified that in March 2010, he attempted to reexamine the van and car and opine "about possible shooting positions," specifically whether the damage to the victim's car "would be consistent with one single shooting position or multiple shooting positions." Pope positioned the car and the van next to one another four feet apart with van's front bumper 10 inches in front of the car's front bumper, inserting dowels into the obvious holes where damage to the car occurred, and determined the following: (1) three holes in the driver's-side car door came toward the door at "a 90-degree angle, directly from the left side of the car," and (2) another hole entered the driver's-side car door at "about a 60-degree angle from the front," as did a ricochet mark on the car's roof. Pope added that if the victim's car and the van had been stationary next to each other when the shooting occurred, both angular areas of damage to the victim's car could have come from the van's front passenger seat, while the perpendicular damage to the victim's car was "consistent with them having come from the cargo . . . compartment of the van."

In summary, ample evidence gave rise to reasonable inferences that all three defendants participated in the shooting of the victim, including the evidence of their positions inside the van shortly after the shooting, the involvement of three different firearms that were discarded in the roadway, and the firing of weapons at multiple angles toward the victim's car. The ambush manner of the shooting, in which the van stopped next to the victim's car and multiple guns were discharged toward the driver's side of the car, following which the van drove away, gave rise to a reasonable inference that defendants intended to kill the car's occupant and premeditated and deliberated the shooting. With respect to the conspiracy charges, the evidence of all three defendants' participation in the seemingly choreographed shooting and their arrest shortly thereafter gave rise to rational inferences that the Daniel defendants participated in an agreement to kill Jamal Bradley. Carolyn Elmore testified that before the shooting, Cordall Neal had

advised her of a conflict with Bradley, which involved Bradley's participation in a robbery of Neal's grandmother and the shooting of Neal's uncle. Elmore recounted that Neal had telephoned her "and told [her] that he was going to pay his twin uncles . . . five thousand dollars apiece to get" Bradley, and shortly before the shooting on February 9, 2002, Neal called to ask Elmore "whether Bradley was home alone." The evidence allowed the Daniel defendants' jury to find them guilty beyond a reasonable doubt of the conspiracy to commit first-degree murder and first-degree premeditated murder charges.

In related contentions, the Daniel defendants complain that the trial court erred in denying their motion to quash the bindover by the district court.⁴ The Daniel defendants note that the bindover rested heavily on preliminary examination testimony by Ronald Slusser, which implicated defendant McGlown but was not admitted against them at trial. "[A]n evidentiary deficiency at the preliminary examination is not ground for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error." *People v Hall*, 435 Mich 599, 601; 460 NW2d 520 (1990). First, the Daniel defendants have not illustrated an evidentiary deficiency at their preliminary examination. Slusser was one of nine witnesses who testified at defendants' preliminary examination, and the district court detailed the evidence offered by bystanders, Houser, Burritt, and Pope, among others, before concluding that probable cause supported the charges "even if we ignore the testimony of Mr. Slusser." Second, ample evidence supported the Daniel defendants' convictions and they have not established that any errors during their trial deprived them of a fair trial or otherwise occasioned any discernible prejudice.

C. SEVERANCE & JURY SELECTION

The Daniel defendants next argue that the trial court should have granted their first motion to sever their trial from defendant McGlown's or order separate juries for all three defendants.⁵ According to the Daniel defendants, the trial court's subsequent decision to order a separate jury for McGlown deprived the Daniel defendants of a fair trial by obligating them to select their jury from less desirable potential jurors.

The Daniel defendants initially requested that they have a separate jury from defendant McGlown.⁶ The trial court initially denied the request. In the midst of selecting a jury, the trial court decided to order separate juries for the Daniel brothers and McGlown after it became clear that McGlown intended to incriminate the Daniel defendants as part of his defense. The first jury went to defendant McGlown. The Daniel brothers then chose a jury from the remaining jurors from McGlown's panel as well as an additional panel of jurors. The Daniel defendants argue that this process deprived them of a fair trial by obligating them to select their jury from less desirable potential jurors.

⁴ Defendant Paul Daniel raises this issue in a pro se Standard 4 brief filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

⁵ Defendant Paul Daniel raises this issue in his Standard 4 brief.

⁶ We note that the Daniel brothers did not request separate juries for themselves.

We conclude that these issues lack merit for several reasons. First, the Daniel defendants affirmatively expressed their satisfaction with the chosen jury, thus waiving and extinguishing any error related to the jury selection process. *People v Clark*, 243 Mich App 424, 426; 622 NW2d 344 (2000). Second, the trial court correctly ordered separate juries after defendants made offers of proof of evidence that would point guilt for the shooting to the other defendants. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994). Third, the Daniel defendants offer no authority in support of their claims that the trial court improperly conducted jury selection. *People v Sowders*, 164 Mich App 36, 49; 417 NW2d 78 (1987) (noting that an appellant abandons claims of error unsupported by authority). Fourth, when jury selection concluded, the Daniel defendants still possessed several peremptory challenges, a fact that undercuts their suggestions that they could not challenge their potential jurors after exercising peremptory challenges during the selection of the initial jury that went to defendant McGlown. See also *People v Hubbard (After Remand)*, 217 Mich App 459, 467; 552 NW2d 493 (1996), overruled in part on other grounds on other grounds by *People v Harris*, 495 Mich 120; 845 NW2d 477 (2014) and *People v Bryant*, 491 Mich 575; 822 NW2d 124 (2012). Finally, contrary to the suggestion that the selection of defendant McGlown's jury had taken the best potential jurors, the trial court called different panels of potential jurors in selecting the Daniel defendants' jury. For these reasons, we reject this claim of error.

IV. PAUL DANIEL'S REMAINING ISSUE IN DOCKET NO. 308230

Paul Daniel lastly asserts that the trial court erred in allowing the prosecutor to elicit abundant hearsay testimony by Carolyn Elmore concerning out-of-court statements by Cordall Neal, who participated in the shooting of the victim but did not testify at trial. Paul Daniel argues that Elmore's testimony about Neal's remarks revealed that they did not occur in furtherance of a conspiracy, and thus did not qualify as nonhearsay under MRE 801(d)(2)(E). Paul Daniel also maintains that Neal's purported statements violated his right of confrontation because they implicated him in the victim's shooting, and he had no opportunity to cross-examine Neal. Although Paul Daniel objected on hearsay grounds to the out-of-court statements made by Cordall Neal, a codefendant already convicted in the shooting of the victim, he never raised a constitutional objection to the witness's testimony. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Consequently, the claim of constitutional error is unpreserved for appellate review.

We review for an abuse of discretion a trial court's decision whether to admit evidence. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). An abuse of discretion exists only if the trial court chose a result that falls "outside the range of reasonable and principled outcomes." *Id.* We review de novo any preliminary questions of law involved in the decision to admit the evidence. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004). We review unpreserved constitutional issues to detect whether any plain error affected the defendant's substantial rights. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012).

The Confrontation Clause in the Sixth Amendment to the United States Constitution "only restricts the admissibility of testimonial statements because '(o)nly statements of this sort cause the declarant to be a "witness" within the meaning of the Confrontation Clause.'" *People v Taylor*, 482 Mich 368, 377; 759 NW2d 361 (2008), quoting *Davis v Washington*, 547 US 813, 821; 126 S Ct 2266; 165 L Ed 2d 224 (2006). Nontestimonial statements remain "subject to

traditional rules limiting the admissibility of hearsay,” but “they do not implicate the Confrontation Clause.” *Taylor*, 482 Mich at 377. The category of testimonial statements includes “prior testimony at a preliminary hearing, before a grand jury, or at a former trial,” *id.* (internal quotation and citation omitted), and statements offered during police investigations “when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 377-378 (citation omitted). The Michigan Supreme Court in *Taylor* characterized as nontestimonial a codefendant’s statements to a witness “because they were made informally to an acquaintance, not during a police interrogation or other formal proceeding, or under circumstances indicating that their primary purpose was to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 378 (internal quotation and citation omitted).

Elmore testified that she lived in Adrian on February 9, 2002; she was an aunt to the victim and his sister, Michelle Newsom. In 2002, the victim occasionally drove his sister’s red car. At that same time, Michelle Newsom was dating Jamal Bradley, who sometimes also drove Michelle’s car. Elmore had been Cordall Neal’s friend for a couple years, and Neal had dated Michelle Newsom before her relationship with Bradley. Elmore recalled that Neal advised her of a conflict with Bradley, which involved Bradley’s participation in a robbery of Neal’s grandmother and the shooting of Neal’s uncle. Elmore recounted that Neal telephoned her “and told [her] that he was going to pay his twin uncles . . . five thousand dollars apiece to get” Bradley. Elmore further recalled that she had hosted a bridal shower for another sister of the victim on the evening of February 9, 2002, and Neal telephoned Elmore, asked whether Bradley was home alone, and inquired about the victim’s whereabouts. In Elmore’s recollection, she learned of the victim’s death later that evening, and the next day Neal telephoned her again. Neal “was crying and told [her] he knew it wasn’t meant for [the victim], it was meant for” Bradley. Neal apologized to Elmore, and in response to Elmore’s statement that he killed her nephew, Neal declared, “No, I didn’t do the shooting. I was just the driver.”

The record reflects that Neal’s statements to Elmore qualify as nontestimonial “because they were made informally to an acquaintance, not during a police interrogation or other formal proceeding, or under circumstances indicating that their primary purpose was to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* (internal quotation and citation omitted). Consequently, the Michigan Rules of Evidence alone govern the admissibility of Elmore’s testimony concerning Neal’s statements. *Id.* The prosecutor posits that the trial court could admit Elmore’s testimony regarding Neal’s statements pursuant to both MRE 801(d)(2)(E) and MRE 804(b)(3).

Under MRE 804(b)(3), a court may admit hearsay statements by an unavailable witness if the statement

was at the time of its making so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant’s position would not have made the statement unless believing it to be true. . . .

Our Supreme Court in *Taylor*, 482 Mich at 379, reiterated the following guidance concerning admissibility under MRE 804(b)(3):

Where, as here, the declarant’s inculcation of an accomplice is made in the context of a narrative of events, at the declarant’s initiative without any prompting or inquiry, that as a whole is clearly against the declarant’s penal interest and as such is reliable, the whole statement—including portions that inculcate another—is admissible as substantive evidence at trial pursuant to MRE 804(b)(3). [Internal quotation and citation omitted.]

We conclude that the incriminating statements that Neal initiated to Elmore qualified as admissible pursuant to MRE 804(b)(3), “including [the] portions that inculcate[d]” the Daniel defendants. *Id.* Although the trial court did not invoke this rule as a basis for overruling defendants’ hearsay objections, the court reached a correct result in admitting the evidence. *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005), overruled in part on other grounds in *People v Burns*, 494 Mich 104, 112-113; 832 NW2d 738 (2013)(observing that this Court will not reverse a trial court decision when the trial court reaches the correct result even if for a wrong reason).

V. DEFENDANT MCGLOWN’S REMAINING ISSUES IN DOCKET NO. 308231

A. ADMISSION OF PRIOR TESTIMONY

Defendant McGlown complains that the trial court erred in admitting out-of-court testimonial statements by Ronald Slusser, a jail inmate who supplied critical evidence against him. Defendant McGlown challenges the trial court’s ruling that the prosecutor employed due diligence in seeking to produce Slusser for trial, and asserts that he lacked an opportunity to fully cross-examine Slusser at the preliminary examination because some information impugning Slusser’s veracity came to light only after the examination.⁷ We review the trial court’s evidentiary rulings for an abuse of discretion. *Feezel*, 486 Mich at 192. We review for clear error a trial court’s findings of fact, including a finding of due diligence. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995).

MRE 804 identifies hearsay exceptions for certain statements by unavailable declarants. The potentially applicable subrule in this case, MRE 804(a)(5), defines the concept of “unavailability as a witness” to “include[] situations in which the declarant” “is absent from the hearing and the proponent of a statement has been unable to procure the declarant’s attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.”

The test whether a witness is “unavailable” as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends

⁷ Specifically, defendant McGlown claims that Slusser made racist remarks and his testimony was motivated by race.

on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. . . . [*People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998).]

In this case, the parties agreed that the prosecutor had subpoenaed Slusser to appear for trial; Slusser appeared at trial and agreed that his subpoena would extend through a forthcoming trial date, and Slusser did not later reappear for trial due to his brief stay in an Indiana psychiatric hospital. The hospital intended to promptly release Slusser, but Slusser expressed an unwillingness to reappear in Michigan because of his belief that another Michigan county had issued a warrant for his arrest. The undisputed facts lead us to conclude that the trial court did not clearly err in finding Slusser unavailable on the basis that he had persisted “in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so.” MRE 804(a)(2); see also *People v Adams*, 233 Mich App 652, 659 n 6; 592 NW2d 794 (1999).⁸

We further conclude that the court correctly admitted Slusser’s preliminary examination testimony in conformity with MRE 804(b)(1). MRE 804(b)(1) protects against a hearsay-based exclusionary challenge “[t]estimony given as a witness at another hearing of the same or different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” Slusser’s preliminary examination testimony occurred in the course of the same proceeding against defendants. The transcript of Slusser’s prior questioning by the three defense attorneys brought to light the self-interested nature of his testimony in several respects and other potential credibility issues inherent in Slusser’s testimony. Furthermore, at defendant McGlown’s trial counsel’s request, the trial court agreed to read his jury the preliminary examination cross-examination of Slusser by defense counsel for all three defendants. Our review of the record reflects that defendant McGlown enjoyed an opportunity and a similar motivation to develop Slusser’s testimony through cross-examination during the preliminary examination. *Adams*, 233 Mich App at 659; *People v Morris*, 139 Mich App 550, 555; 362 NW2d 830 (1984) (observing that the “[d]efendant had an opportunity [to cross-examine the witness during her prior testimony] since the testimony arose in a prior preliminary examination in which he was also the defendant”).

We conclude that the trial court acted within its discretion in admitting Slusser’s preliminary examination testimony under MRE 804. Because the trial court correctly characterized Slusser as an unavailable witness and defendant McGlown had a pretrial opportunity to cross-examine Slusser, no violation of defendant McGlown’s right of confrontation occurred. *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008).

⁸ Although the prosecutor may have mistakenly stated that it lacked “authority to get [Slusser] out of Indiana,” our review of the trial court’s ruling to admit Slusser’s prior testimony reveals no indication that the court took this contention into account in the due diligence analysis.

Furthermore, we reject that defendant McGlown can demonstrate any prejudice,⁹ given the other properly admitted testimony by Delbert Schaefer, an inmate housed in a jail cell between defendant McGlown and Slusser, that defendant McGlown offered detailed admissions to his participation in the shooting.

B. WITNESS INVOCATIONS OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

Defendant McGlown next asserts that the trial court deprived him of his right to raise certain defenses at trial. In McGlown's view, the court erred in invoking the Fifth-Amendment-based privilege against self-incrimination for important defense witnesses because there was no reasonable likelihood that testimony by these witnesses could have incriminated them. McGlown further disputes the propriety of the court's actions in barring any testimony by the witnesses, and suggests that the court instead should have demanded that the witnesses invoke their Fifth Amendment privileges in response to each question posed by counsel.

We conclude that defendant McGlown has abandoned these issues by neglecting to identify any relevant matters that the proposed witnesses could prove at trial. *Payne*, 285 Mich App at 195 (restating that an appellant cannot "merely announce his position and leave it to this Court to discover and rationalize the basis for his claims") (internal quotation and citation omitted). While defendant McGlown claims that there was no reasonable probability that a direct answer by the witnesses would have incriminated the witnesses, he failed to explain or support that position.

Even assuming defendant McGlown properly presented this issue for review, we find no error. Both the Fifth Amendment to the United States Constitution and the Michigan Constitution, Const 1963, art 1, § 17, protect a person against compulsion to "be compelled in any criminal case to be a witness against himself." *People v Wyngaard*, 462 Mich 659, 671 n 10; 614 NW2d 143 (2000), quoting US Const, Am V. The prohibition contained in the Fifth Amendment "not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Id.* at 671-672 (internal quotations and citations omitted). A witness may invoke "the constitutional privilege against self-incrimination" when a reasonable basis exists "for [the] witness to fear incrimination from questions." *People v Dyer*, 425 Mich 572, 578; 390 NW2d 645 (1986). Neither the prosecutor nor the defense may "put a witness on the stand solely to have him assert his Fifth Amendment privilege in front of the jury," irrespective whether the witness possesses a valid privilege against self-incrimination. *People v Gearn*s, 457 Mich 170, 193-194, 201; 577 NW2d 422 (1998), overruled in part on other grounds in *People v Lukity*, 460 Mich 484, 492-494; 596 NW2d 607 (1999). In *Gearn*s, the Supreme Court reconfirmed the proper procedure for ascertaining a witness's intent to assert the privilege against self-incrimination:

⁹ The erroneous admission of evidence is harmless if it did not prejudice the defendant. *People v Bartlett*, 231 Mich App 139, 158-159; 585 NW2d 341 (1998).

[T]he judge must hold a hearing outside the jury's presence to determine if the witness' privilege is valid, explaining the privilege to the witness. If the court concludes the privilege is not valid, it must determine whether the witness intends to proceed with asserting an invalid privilege. If the witness does so intend, then the witness may not be called. [*Id.* at 202.]

In this case, the trial court properly held hearings outside the presence of the jury and determined that each of the proposed witnesses had a valid privilege. Defendant further claims that the witnesses should have been questioned in front of the jury, and made to assert the privilege question-by-question. However, a witness may not be put on the stand only to assert his Fifth Amendment privilege. *Id.* at 193-194, 201. For these reasons, we detect no error.¹⁰

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant McGlown lastly argues that trial counsel was ineffective for neglecting to arrange for potentially exculpatory gunshot residue testing of defendant McGlown's clothing, which would have strongly substantiated that he did not fire a weapon. Because defendant did not raise an ineffective assistance of counsel claim in a motion for a new trial or request a *Ginther*¹¹ hearing, our review of this issue is limited to errors apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

Both the United States Constitution and the Michigan Constitution guarantee criminal defendants the right to effective assistance of counsel. US Const, AM VI; Const 1963, art 1, § 20. "To demonstrate ineffective assistance of counsel, a defendant must show that his or her attorney's performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance caused him or her prejudice." *People v Nix*, 301 Mich App 195, 207; 836 NW2d 224 (2013), citing *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "To demonstrate prejudice, a defendant must show the probability that, but for counsel's errors, the result of the proceedings would have been different." *Nix*, 301 Mich App at 207. It is presumed that trial counsel used effective trial strategy, and a defendant has a heavy burden to overcome this presumption. *Payne*, 285 Mich App at 190. This Court "will not substitute [its own] judgment for that of counsel on matters of trial strategy," nor will it "use the benefit of hindsight when assessing counsel's competence." *Id.*

Defendant McGlown did not substantiate his contention that the absence of gunshot residue on his clothing would have tended to prove his innocence. Burritt testified that the state police forensic laboratory only performed a gunshot residue analysis referred to as a distance determination, and testing occurred when the laboratory received "clothing that is damaged by the passage of a projectile." The distance determination testing did not occur in this case

¹⁰ Because we find no error in the trial court's decision not to allow the witnesses to testify, we also do not find that defendant McGlown's constitutional right to call witnesses at trial was impugned.

¹¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

because none of the clothing that the laboratory received was “damaged by a firearm.” Burritt described another form of gunshot residue testing sought to ascertain the presence of elements discharged when someone fired a gun (usually antimony, barium, and lead) on clothing or swabs from a person’s hands. When queried about why the state police laboratory did not perform the elemental gunshot residue testing, Burritt explained that “the results don’t necessarily indicate that an individual fired a weapon—because you could get the same results by handling a weapon, or the same results could” occur “if a person is in the . . . close vicinity of a firearm when it’s discharged. So you may not necessarily discharge the weapon, but you could have gunshot residue on your clothing.” Burritt characterized gunshot residue as “a very fragile piece of evidence,” and denied that a negative gunshot residue test “could have established [defendant McGlown’s] innocence,” or the gunshot residue tests necessarily were reliable.

We conclude that defendant McGlown did not demonstrate that his trial counsel’s decision against securing gunshot residue testing of his clothing deprived him of a substantial defense, one which “might have made a difference in the outcome of the trial.” *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). The absence of gunshot residue on defendant McGlown’s clothing would not have established that McGlown did not fire a firearm, and presence of residue also would not have proven that he fired a weapon. Given that defendant McGlown’s undisputed presence in the van when the Daniel defendants shot the victim may have imparted gunshot residue to his clothing, he failed to overcome the presumption that his defense counsel pursued a reasonable trial strategy in opting against demanding gunshot residue testing of the clothing defendant McGlown wore. *Payne*, 285 Mich App at 190. In addition, neither test result would have affected defendant’s conviction under an aiding and abetting theory. Thus, defendant was not denied the effective assistance of counsel.

VI. DEFENDANT PETER DANIEL’S REMAINING ISSUE IN DOCKET NO. 308575

Peter Daniel lastly challenges the trial court’s ruling to admit allegedly inaccurate and irrelevant expert shooting reconstruction testimony by Reinhard Pope and Allan Avery. According to Peter Daniel, (1) the testimony qualified as irrelevant and unduly prejudicial, (2) neither Pope nor Avery possessed expertise in firearm trajectories or shooting scene reconstruction, and (3) the prosecutor did not present a scientific methodology supporting the practice of shooting scene reconstruction.¹²

We review a trial court’s determination regarding the qualification of an expert and admissibility of expert testimony for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). This Court also reviews for a clear abuse of discretion a trial court’s decision whether to admit evidence. *Feezel*, 486 Mich at 192.

¹² At trial, Peter Daniel challenged the admissibility of Pope’s testimony as unsupported by facts in the record and urged the court to exclude the testimony as irrelevant and unfairly prejudicial. Peter Daniel did not specifically object to Pope’s qualifications as an expert witness. Concerning Avery, Peter Daniel raised at trial the same objections that he raises on appeal. For judicial efficiency, we treat this issue as preserved.

Peter Daniel disputes whether testimony by Pope and Avery was properly admissible pursuant to the Michigan Rules of Evidence, primarily MRE 702, which provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

“The trial court has an obligation under MRE 702 to ‘ensure than any expert testimony admitted at trial is reliable.’” *People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007), quoting *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). “While the exercise of the gatekeeper function is within a court’s discretion, the court may neither abandon this obligation nor perform the function inadequately.” *Dobek*, 274 Mich App at 94.

A. POPE

The trial court held a hearing to address the admissibility of Pope’s testimony. Pope testified that he had worked for 16 years as “a firearms and tool marks examiner at the [Michigan State Police] forensic science laboratory.” Pope explained that his duties as a firearm and tool mark examiner included crime scene reconstructions and shooting scene reconstructions. His qualifications included two years of state police training that encompassed topics like “a crime scene processing school,” “the identification of bullets and cartridge cases,” and observing bullet damage to vehicles and attempting to ascertain from where the bullet had come; a trajectory school in 2002; a shooting scene reconstruction class in 2003 that focused on “recognizing damage caused by projectiles, determining directionality through different materials, wood, metal, [and] glass,” and recognizing the “directionality of ricochet marks” “[a]nd measuring angles”; a week-long “international training conference for . . . the Association of Firearms and Tool marks Examiners” that incorporated “modules on shooting scene reconstruction or issues that you may encounter while doing that work”; and ongoing yearly training for the state police laboratory firearms unit. Pope currently worked for a company that performed training “for police agencies in shooting scene reconstruction.”¹³ According to Pope, several courts in

¹³ Pope elaborated that he usually “prepare[d] practical exercises for the students,” explaining:

So we’ll get vehicles . . . that a wrecker company will tow to the location that we’re doing the training [A]nd then I will actually shoot into the vehicles at different angles, ricochet bullets off the vehicles from different directions, that sort of thing and walk the students through the scenario to show them, okay, this is what a ricochet mark looks like, . . . right to left, left to right, steep angle, shallow angle, that sort of thing.

After we’ve done that, . . . we actually provide them scenarios, so we get several vehicles. The last time we had four vehicles that were towed there, and

Michigan had previously qualified him as an expert in shooting scene reconstruction, and between 30 and 35 of his testimonies “involved trajectories and that sort of thing.”¹⁴

In response to the trial court’s question about the manner in which Pope performed his measurements, he testified:

Well, it really depends on what I’m measuring. Normally, . . . if we observe a bullet hole in a vehicle, then we would measure with a measuring tape how far it is from the edge of the door, how far up from the ground, that sort of thing. We can measure the diameter of the hole. As far as measuring the angle, we can use a digital angle finder.

So, . . . if we have two points, say the bullet goes through the door of a vehicle, so I have the hole in the outer door skin and the inner door skin. Well, bullets, unless they hit something else, travel basically in a straight line. So you can take a dowel and put it through those holes, so that’s the angle that the bullet went through the door. Then I can take an angle finder and put it on the dowel. That’s the angle of that particular shot

If you want to know . . . where could a shooter be, you could just continue that angle back. And I’ve had, at times, a person that’s a similar height to a shooter hold a gun to see . . . how far back could you physically be to make that shot. And, sometimes, you can’t say because it’s a very shallow angle. You could be hundreds of yards away. If it’s a very steep downward angle, you couldn’t be very far back because you physically can’t reach that high.

We conclude that the trial court acted within its discretion in ruling that Pope’s prospective testimony met all the qualifications for admissibility in MRE 702. Pope’s preliminary testimony established that he possessed substantial knowledge, skill, experience, and training in examining, measuring, and identifying the origins of bullet damage. Pope opined that if the van and car had stood alongside each other, the perpendicular projectile marks on the victim’s car likely came from the rear of the van, from which the police removed Peter Daniel shortly after the shooting. The fact that gunfire likely came from the back of the van was highly probative of Peter Daniel’s identity as a participant in the victim’s shooting death, an issue central to his guilt of the charges, and thus assisted the jury in understanding the evidence. MRE 401; MRE 702. Peter Daniel fails to specifically explain any manner in which Pope’s testimony was unfairly prejudicial under MRE 403. Furthermore, Pope’s testimony was based on the

then I prepared exercises, which would include shooting into the vehicle perpendicular, and then at . . . greater and lesser angles, ricochets, that sort of thing, and I would give that to them as a problem to solve, . . . they would then examine that.

¹⁴ Pope added that he had previously testified in cases in which bullet impacts on a vehicle had occurred at different angles, “which was consistent . . . with . . . either the shooter or the vehicle . . . moving.”

eyewitness accounts in the trial record, and the record contains no indication that Pope's employment of mathematical principles was unreliable or unreliably applied in this case.

B. AVERY

In a separate evidentiary hearing, Avery testified that since January 2005 he had worked for the Michigan State Police as a traffic crash reconstructionist, which involved the reconstruction of "crashes and crime scenes using [a] Total Station and [computer-aided drawings] CAD drawings." Avery described the Total Station as an electronic device that measured distances and angles in both horizontal and vertical axes. With respect to Avery's specialized training, he recalled that he had received 32 hours of training for the Total Station, 32 hours of a CAD diagramming class, and had used the Total Station approximately 250 times. Avery explained that the Total Station collected "the data at the scene," the data went into the CAD program, which then created a diagram of a scene.

Avery had prepared for trial a video animation by using Visual Statement, a CAD program mainly used to reconstruct traffic crash scenes that had additional use for documenting crime scenes. Avery testified that in this case he had transposed into the Visual Statement program measurements of the shooting scene made by the Total Station in 2002, and the program created a three-dimensional view. According to Avery, approximately a dozen courts had qualified him as an expert in accident reconstruction using the Total Station and the Visual Statement program. Avery recalled that he had used the Visual Statement program to assist his reconstruction of crime scenes approximately a dozen times, some of which involved ballistics evidence, but denied that a court had qualified him as an expert to offer testimony regarding a crime scene reconstructed with the Visual Statement program. Avery recounted that he had undergone training to use Visual Statement, and on 10 or 12 occasions he had taught other officers how to use Visual Statement. When asked whether any practical difference existed between using Visual Statement for accident reconstruction as opposed to crime scene reconstruction, Avery responded, "No, . . . it's just connecting the dots, whether the dots are in a crime scene or whether the dots are in a traffic crash."

We conclude that the trial court acted within its discretion in admitting Avery's testimony and animation under MRE 702. Avery's testimony reflected that he possessed significant experience, knowledge, skill, and training in utilizing the tools of accident and crime scene reconstruction, including Total Station and CAD programs, which performed the same functions in the contexts of accident and crime scene reconstruction. The evidence provided by Avery rested on ample facts and data. He prepared a reconstruction of the present crime scene by placing the victim's car in the intersection of Park Street and College Avenue with the assistance of crime scene drawings and photographs, measured the angle of dowel rods placed into some areas of bullet damage in the car and imported the data into a CAD program, measured the dimensions of the van, placed the van next to the car three and five feet away in the roadway,¹⁵ and input the data into the CAD program to generate "a bunch of points in a three-dimensional

¹⁵ Avery also created animations depicting the van between 7 feet and 11 feet away from the victim's car.

drawing.” The CAD-created animation, which concretely illustrated for the jurors the angles of the gunfire from the van into the victim’s car, had significant probative value in establishing Peter Daniel’s participation in the charged crimes, and Peter Daniel identifies no specific unfair prejudice allegedly inherent in the evidence supplied by Avery. MRE 401; MRE 403; MRE 702. Finally, nothing in the record suggests that Avery misapplied his methods and principles to the present facts.

Affirmed.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood